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IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1637

THE CITY OF BURBANK, a municipal corporation; DR. JARVEY GILBERT, Mayor; ROBERT R. MCKENZIE, Vice-Mayor; Councilman GEORGE W. HAVEN; Councilman ROBERT A. SWANSON; Councilman D. VERNER GIBSON; JOSEPH N. BAKER, City Manager; SAMUEL GORLICK, City Attorney for the City of Burbank and REX R. ANDREWS, Chief of Police of the City of Burbank,

Appellants,

—vs.—

LOCKHEED AIR TERMINAL, INC., a corporation, PACIFIC SOUTHWEST AIR LINES, a corporation, and AIR TRANSPORT ASSOCIATION OF AMERICA,

Appellees.

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AS AMICUS CURIAE

Opinions Below, Questions Presented and Constitutional and Statutory Provisions Involved

In the interest of brevity the statements contained in the brief of the Appellees with respect to the Opinions Below, Questions Presented and Constitutional and Statutory Provisions Involved are hereby adopted.

Preliminary Statement

Air Line Pilots Association, International of 1625 Massachusetts Avenue, N. W., Washington, D. C., submits this brief as *amicus curiae* pursuant to the written consent of all parties. A copy of such written consent dated December 6, 1972 is submitted herewith. This brief is submitted in support of the position of the Appellees.

Status and Interest of Air Line Pilots Association, International

Air Line Pilots Association, International, hereinafter ALPA, is an international labor organization affiliated with the American Federation of Labor-CIO.

ALPA is an unincorporated association organized for the purposes and objectives of a labor organization. It is the collective bargaining representative under the Railway Labor Act of approximately 28,000 pilots and 15,000 flight attendants employed by the majority of the scheduled air carriers of the United States.

ALPA has actively represented such employees not only for purposes of collective bargaining but also for the purpose of developing and maintaining standards of safety in matters pertaining to air transportation since 1933.

ALPA through its Safety Organization has maintained a deep involvement in matters of safety. It has participated actively in the development of effective safety programs including the investigation of airline accidents and the creation of a nationwide system. A substantial portion of ALPA's budget has been devoted to such purposes.

The nature of ALPA's standing and interest is shown by the leading cases on the question of federal supremacy and preemption as to air traffic regulation, and particularly as to air traffic regulation involving control of aircraft noise. ALPA was a plaintiff in *Allegheny Airlines, Inc.* v. *Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), 238 F. 2d 812 (2d Cir. 1956); and in *American Airlines, Inc.* v. *Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), aff'd. 398 F. 2d 369 (2d Cir. 1968), cert. den., 393 U.S. 1017 (1969); and in *Air Transport Association of America, et. al.* v. *The City of Inglewood, etc., et al.*, F. Supp. (Central District of California, 1972).

Summary of Previous Decisions

In *Cedarhurst* a village adjacent to John F. Kennedy Airport (then Idlewild) asserted the power to control the altitude of aircraft flying over its boundaries when landing at or taking off from the airport. The local ordinance, which was aimed at noise control, prohibited flights at an altitude below 1,000 feet.

In *Hempstead* the township adjacent to the same airport attempted to achieve noise control for aircraft crossing its boundaries without specifically mentioning altitudes but by reference to noise levels in terms of decibels.

In *Inglewood*, a village adjacent to Los Angeles International Airport, attempted to regulate air traffic crossing its boundaries by establishing noise standards in terms of decibels but excluding from the scope of such regulation aircraft operated pursuant to federal air regulations or operating under emergency orders.

In each of the above cases the municipality sought to circumvent the Constitutional protection of federal authority by attempting to segregate noise control from traffic control. In each case the court had no difficulty in perceiving the actual interference with the federal authority over air traffic control despite the attempted artificial segregation of noise from traffic.

In *Cedarhurst* it was asserted that federal authority had not been exercised below 1,000 feet. In *Hempstead* it was asserted that noise control was not an area occupied pursuant to federal authority. In *Inglewood* it was asserted that by reason of the exemption of aircraft operating pursuant to federal air regulations or operating under emergency orders there was neither conflict nor invasion of a preempted area.

The Case at Bar

In the case at bar it has been asserted by the City of Burbank that none of the foregoing authorities is controlling because the local ordinance in question merely prohibits pure jet aircraft from taking off from the Hollywood-Burbank Airport between 11:00 P.M. one day and 7:00 A.M. the next day. It is evidently the theory of the Appellants that an absolute prohibition of all flights during stated hours does not constitute regulation of air traffic in the sense in which air traffic control is exercised and preempted by federal authority.

Decisions Below

The District Court herein concluded:

> "Our scientific and mechanical expertise has not yet solved the problem of noise resulting from the generation of power by jet engines. However, if the time during which the navigable air space may be used is to be curtailed, the Court concludes that the action must come from Congress, or its authorized agency, if the safe and efficient use of the air space is to be maintained and interstate commerce protected from unreasonable burden and interference." (Appendix, p. 373)

Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the Court of Appeals concluded:

> "In this case, we have found the conclusion of federal preemption 'unavoidable.' Furthermore, the Federal Aviation Act also contains language of exclusivity. 49 U.S.C. § 1508 declares that the United States possesses and exercises 'complete and exclusive national sovereignty in the airspace of the United States . . .' That is the same type of expression which the Supreme Court found in the Federal Tobacco Inspection Act to evidence Congressional intent to establish a wholly federal system which States were powerless even to supplement. *Campbell* v. *Hussey*, 368 U.S. 297 (1961)." (Appendix, p. 424)

Referring to the runway preference order dealing with the problem of noise in the vicinity of the airport, which the FAA Chief of the airport traffic control tower at Hollywood-Burbank Airport had issued, the Court of Appeals declared:

"The order stated that '[p]rocedures established for the Hollywood-Burbank airport are designed to reduce community exposure to noise to the *lowest practicable minimum* . . .' (emphasis added). This assertion represents a considered determination by an authorized representative of the FAA that measures of the magnitude of that taken by the City of Burbank are beneath 'the lowest practicable minimum.' The municipal curfew ordinance, therefore, interferes with the balance set by the FAA among the interests with which it is empowered to deal, and frustrates the full accomplishment of the goals of Congress.' Because of this conflict, as well as the general preemption of the area of aircraft noise regulation from the exercise of a State or local government's police power, the Burbank ordinance is unconstitutional, illegal and void." (Appendix, pp. 426-427)

POINT I

The Burbank Ordinance is invalid upon the grounds of conflict, preemption and burden on commerce.

It is the position of ALPA that each of the cases outlined above, including the case at bar, involves the same essential question, namely, whether the area of air traffic control has, pursuant to the Constitution and Act of Congress, been occupied by the federal government or whether it has been reserved for local regulation. ALPA respectfully submits that the decisions above cited holding that the attempted local regulation in each case presented either a direct conflict with federal regulation of air traffic, or the invasion of a preempted area, or a burden on interstate commerce, were correct, and that there is no sound basis

for the Appellants' attempted distinction herein based upon the superficial difference that the local ordinance seeks to control noise by the absolute elimination of all flights during 8 out of 24 hours.

Impact of Local Regulation Upon the National Scheme

In *Hempstead* the District Court made the following statement which was quoted with approval by the District Court in the case at bar:

> "Such an ordinance as Hempstead's cannot be considered in the accident of its particular circumstances. * * * In the perspective of power, the ordinance must be tested as if it were one of a set of ordinances each enacted by a bordering town, and all, taken together, enveloping the airport. Diversion of the airport traffic over another Town would then be impossible and each ordinance would be revealed in its inner nature as a direct regulation of aircraft flight. * * * The question remains, may the municipalities that surround an airport adopt such ordinances as Hempstead's which deny to aircraft those parts of the navigable air space that cannot be used without causing noise on the ground in excess of specified limiting noise spectra.
>
> "* * * * legislation, whatever its purpose, that denies access to navigable air space by local rule cannot but be regarded as a plain and forbidden exertion of the power to regulate commerce as such. * * *
>
> "But even if the commerce clause were not thought without more to preclude local action of the kind here involved, the actual exercise by the Congress of the power to regulate in this field is so pervasive as to preclude valid enactment of the Hempstead Ordinance. It would be difficult to visualize a more com-

prehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation."

* * * * *

"Local initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause. It cannot coexist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic." (272 F. Supp. 226, at pp. 231-232, 235; Appendix, pp. 364-365)*

The District Court's analysis goes to the heart of the matter. Interstate air traffic control is an indivisible structure. It cannot realistically be broken into separate segments measured by the geographical boundaries of villages, townships, cities and the like. Air traffic has added new dimensions to transportation. It is not contained within bounds marked on the surface of the earth as are railways, waterways and highways; it operates at a speed approaching that of sound. Air traffic must be described as a form of interstate commerce essentially different from pre-existing forms of transportation. Its path through space is based upon the necessities of aerodynamics rather than the conventions of municipal jurisdiction.

A local ordinance affecting air traffic cannot be considered in isolation. The national system of air traffic is a sensitive organism, all parts of which are closely interrelated. What may appear to be a trivial matter at a small airport may interrupt the safe flow of interstate air traffic

* Doubts as to the proliferation of local restrictions may be answered by reference to *Cedarhurst, Hempstead, Inglewood* and similar cases demonstrating the ingenuity and persistence of local authorities in their attempts to regulate.

over thousands of miles. Exhibit 33 (Appendix, pp. 115, *et seq.*) is an order of the FAA entitled "Central Flow Control Order" which provides for centralized flow control from Washington, D. C. in order to coordinate flow control throughout the national air traffic system. Other federal air traffic control centers, regional and local, also established by FAA order, must report their intentions to the Washington, D. C. center in advance, and await approval, in order to achieve system-wide coordination. (Appendix, pp. 115, 390-391).

The admitted facts in this case show the all pervasive federal control of air transportation, including the licensing of pilots, construction and maintenance of airport facilities, airworthiness certification of aircraft, and nationwide control of air traffic (Appendix, p. 384). The District Court correctly found:

> "Aircraft have such a range and such speed and they involve such technical complexity that they have to be managed on a centralized basis. The transport aviation industry is unique and must be regulated on a national basis, both technically and economically, by the Federal Government. The approach to the solution of air transportation problems at the local level does not work. Regulation on a national basis is required because air transportation is a national operation." (Finding No. 59, Appendix, p. 394.)

In the light of these facts it is somewhat ludicrous to contemplate the operation of the local ordinance here in question which would relegate to the "City's Police Department" and to the "Watch Commander" of the local police the question whether there is a flight "of an emergency nature".

The locking up of the Hollywood-Burbank Airport between the hours of 11:00 P.M. and 7:00 A.M. cannot be disregarded as a harmless local measure. It has significant reverberations throughout the national system of air traffic control. The measurement of time for national air traffic control regulation is not limited to the clock located at the Burbank City Hall. When the clock is 11:00 P.M. at Burbank it is 8:00 P.M. at Hawaii. When the clock is 5:00 A.M. at Burbank it is 8:00 A.M. at New York.

The District Court made the following findings of fact bearing upon the effects of the Burbank curfew:

> ". . . if a curfew ordinance such as that before this Court were held valid, similar ordinances would be adopted by virtually all cities surrounding airports." (Finding No. 69, Appendix, p. 396.)
>
> "The imposition of curfew ordinances on a national basis would have a near catastrophic effect on the national air transportation system . . .". (Finding No. 70, Appendix, p. 396.)
>
> "The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching of flights during these hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding communities." (Finding No. 78, Appendix, p. 399.)

The necessity for an exclusively federal system of air traffic control is apparent in more than an academic sense. There could hardly be a more effective demonstration of the merger of constitutionality and practicality which was the design of the writers of our Constitution.

POINT II

Huron is not applicable

The case of *Huron Portland Cement Company* v. *Detroit*, 362 U.S. 440, 80 Sup. Ct. 813 (1960) is not applicable. It was properly distinguished from the case at bar by the Court of Appeals on the ground that in *Huron* the purpose of the federal inspection laws was limited to protection against the perils of marine navigation, a purpose which was unaffected by local control of air pollution. In the case at bar the crucial fact is that Congress has granted the FAA responsibility for balancing "considerations of safety, efficiency, technological progress, common defense and environmental protection" in terms allowing of no doubt as to the exclusivity of federal jurisdiction. (Circuit Court opinion (Appendix p. 419); 49 U.S.C. § 1431 (1968)).

Even if the above distinction were not made it would still have to be concluded that *Huron* is not applicable. That case was decided by this Court a scant two years after enactment of the Federal Aviation Act of 1958. In the decade since *Huron* air transportation has vastly increased in scope and complexity. This Court had no occasion then for concern regarding any claims of applicability of its ruling to the area of national air transportation. *Huron* involved marine transportation on a narrow inland waterway. No menace to a sensitive nationwide system of air transportation could then be perceived in a local smoke-control ordinance. Since *Huron*, passage by Congress of the 1968 Noise Abatement Amendment (Federal Aviation Act § 611; 49 U.S.C. § 1431) and of the Noise Control Act of 1972 (Public Law No. 92-574) made clear the Congressional intention to preempt to federal authority the regulation of aircraft noise. The application of *Huron* to the complexities of jet aircraft traveling at near

sonic speeds, under a comprehensive system of federal control, would be less than realistic. *Huron* is obviously distinguishable from the case at bar, not only on the ground stated by the Court of Appeals but also on the ground of historical development.

POINT III

Questions as to the adequacy of noise regulation are not appropriate for the Court's consideration.

Much has been said about the impact of aircraft noise upon the comfort and health of those who live near airports. It is a subject which generates emotion. Now that ecology has become a by-word, sentiment is stronger than ever in favor of a peaceful and secure environment. ALPA is no less sensitive to these community concerns than other groups. Our sympathy for such aims must not, however, distract us from the pivotal question, which is whether the attainment of such aims must be entrusted to the federal government or to the numerous municipalities lying adjacent to the interstate airports. It is argued that the FAA has not adequately protected local communities from aircraft noise.* That argument is not properly addressed to the courts. It is a contention which should be addressed to the FAA and to Congress. The question here is not how well has the FAA regulated but who is authorized to regulate under the Constitution and the controlling Acts of Congress. As to that essential question it is respectfully submitted that the answer is clear.

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* The fact is, however, that the FAA has been active in this area. Findings 54, 55, 56 and 57 show various procedures established by the FAA to alleviate noise. See also Noise Control Act of 1972 (Public Law No. 92-574).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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